Table of Contents.

Opinion below	1
Jurisdiction	2
Questions presented	2
Statutory provisions involved	3
Statement of the case	8
Reasons for granting the writ	12
I. The decision below raises serious and recurring questions in the administration of federal criminal justice as to what procedures are required by the Constitution or statutes when a lower court exercises its power to sentence a convicted defendant	12
II. The decision below raises serious and recurring questions as to the proper interpretation of 50 U.S.C. App. § 462, and there is a widespread conflict among lower courts in the application of its penal sanctions	19
Conclusion	27
Appendix	29

Table of Authorities Cited.

Cases.

Baker v. United States, 338 F. 2d 931	14
Ballew v. United States, 160 U.S. 187	16
Bartone v. United States, 375 U.S. 52	15
Board of Regents of State Colleges v. Roth, 408 U.S. 564	17
Boykin v. Alabama, 395 U.S. 238	17
Bryan v. United States, 338 U.S. 552	15, 16
Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO v. McElroy, 367 U.S. 886	17
Farrar v. Wheeler, 145 F. 482	16

Fay v. New York, 332 U.S. 261 15
Francis v. United States, 152 F. 155 16
Furman v. Georgia, 408 U.S. 238 18, 19
Goldberg v. Commissioner of Social Services of New York v. Kelly, 397 U.S. 254 12
Haller v. Robbins, 409 F. 2d 857 13, 14
Hanley v. United States, 123 F. 849 16
Haynes v. United States, 101 F. 817 16
Kent v. United States, 383 U.S. 541 12, 14
La Buy v. Howes Leather Co., Inc., 352 U.S. 249 15
Marshall v. United States, 360 U.S. 310 15
McGuatha v. California, 402 U.S. 183 18, 19
McGee v. United States, 462 F. 2d 243 12, 15
McNabb v. United States, 318 U.S. 332 15
Mempa v. Rhay, 389 U.S. 128 14
Morrissey v. Brewer, 408 U.S. 471 12, 17
North Carolina v. Pearce, 395 U.S. 711 12
Perry v. Sindermann, 408 U.S. 593 17
Scott v. United States, 419 F. 2d 264 14
Sherman v. United States, 356 U.S. 369 19
Smith v. United States, 223 F. 2d 750 14
Smith v. United States, 273 F. 2d 462 17
Specht v. Patterson, 368 U.S. 605 14, 17
Thomas v. United States, 368 F. 2d 941 13, 15
Townsend v. Burke, 334 U.S. 736 13
United States v. Adams, 449 F. 2d 122 15
United States v. Bryant, 442 F. 2d 775 14
United States v. Carty, 447 F. 2d 964 13
United States v. Charles, 460 F. 2d 1093 15
United States v. Daniels (I), 429 F. 2d 1273 14, 19, 25
United States v. Daniels (II), 446 F. 2d 967 13, 14

United States v. Dudley, 436 F. 2d 1057 14
United States ex rel. Brown v. Rundle, 417 F. 2d 282 13, 14
United States for use of John Davis Co. v. Illinois Surety Co., 226 F. 653, aff'd 244 U.S. 376 16
United States v. Freed, 460 F. 2d 75 15
United States v. Griffin, 434 F. 2d 740 14
United States v. Latimer, 415 F. 2d 1288 12, 13
United States v. McCord, 5 SSLR 3490 15, 25, 27
United States v. McCoy, 429 F. 2d 739 13, 26
United States v. McKinney, 427 F. 2d 449 14
United States v. Preston, 445 F. 2d 808, cert. denied, 404 U.S. 1022 13, 15
United States v. Tucker, 404 U.S. 443 13, 16
United States v. United Mine Workers of America, 330 U.S. 258 19
United States v. Weston, 448 F. 2d 626, cert. denied, 404 U.S. 1061 13
United States v. Wiley, 278 F. 2d 500 13, 15
Verdugo v. United States, 402 F. 2d 599 14
Whitworth v. United States, 114 F. 302 16
Williams v. New York, 337 U.S. 241 24
Yates v. United States, 356 U.S. 363 15
Federal Rules of Criminal Procedure, Rule 32 2, 7, 17

STATUTES, ETC.

United States Constitution, Fifth Amendment 2
United States Constitution, Sixth Amendment 2, 14
18 U.S.C. §§ 1403, 1917 22
Probation Act, 18 U.S.C. § 3651 2, 6, 23
Federal Youth Corrections Act, 18 U.S.C. § 5010 2, 5, 23
26 U.S.C. § 7237(d) 23
28 U.S.C. § 1254(1) 2
28 U.S.C. § 2106 8, 15, 16, 17

Military Selective Service Act of 1967, § 12, 50 U.S.C App. § 462 2, 3, 8, 18, 19, 20

MISCELLANEOUS.

ABA Project, Appellate Review of Sentences, § 2.3 (Approved Draft, 1968); Sentencing Alternatives and Procedures, § 5.7 (Approved Draft, 1968) 17, 18

American Bar Association Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures, § 5.6 (Approved Draft, 1968) and Appellate Review of Sentences, § 2.3 (Approved Draft, 1968) 13

Herlands, When and How Should a Sentencing Judge Use Probation, 35 F.R.D. at 487 (1964) 23

Institute on Sentencing, 35 F.R.D. 381 (1964), Form No. 14 23

Jaffe, Judicial Control of Administrative Action, 182 (1965) 26

91st Cong., 2d Session, at 12853, 12861, 12871-12872 22, 25

Note, Procedural Due Process at Judicial Sentencing for Felony, 81 Harv. L. Rev. 821 (1968) 13

Note, Sentencing Selective Violators: A Judicial Wheel of Fortune, 5 Col. L. J. & Soc. Probs. 160, Table III (1969) 22

Report of the President's Commission on an All-Volunteer Armed Force (1970) 23

Sentences in Selective Service and Income Tax Cases, 52 F.R.D. 481 (1970) 20

Statistical Abstract of the United States, p. 163, Chart No. 268 (1972) 22

Statistical Abstract of the United States, p. 264, Chart No. 433 (1972), SSLR 6021 24

Statistical Abstract of the United States, p. 266, Chart No. 436 (1972) 20

Supreme Court of the United States.

OCTOBER TERM, 1972.

No.

JOHN DABNEY COLLIER WALKER,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT.

The petitioner, John Dabney Collier Walker, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit entered in this proceeding on December 4, 1972.

Opinion Below.

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. No opinion was rendered by the District Court for the District of Massachusetts.

Jurisdiction.

The judgment of the Court of Appeals for the First Circuit was entered on December 4, 1972. This petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

1. Whether the Fifth Amendment mandate that no person shall be deprived of liberty without due process, and/or the Sixth Amendment right to effective assistance of counsel, and/or the right to judicial review of a constitutionally invalid sentence, and/or Rule 32 of the Federal Rules of Criminal Procedure, entitle a defendant to procedures that limit the possibility of merely arbitrary action, such as a statement of reasons for the sentence imposed upon him by the trial judge.

2. Whether in the exercise of its supervisory power over criminal proceedings in the lower federal courts, should this Court require the trial judge to adopt procedures that limit the possibility of merely arbitrary action and, at a minimum, to set forth the reasons for the sentence he imposed where the record shows a clear abuse of discretion in weighing the factors relevant to sentencing under the applicable statutes and governing law.

3. Whether the Fifth Amendment mandate that no person shall be deprived of liberty without due process, and/or the policy of section 12 of the Military Selective Service Act of 1967, 50 U.S.C. App. § 462, as reflected in the grant of probation to 63% of defendants sentenced thereunder, and/or the Federal Youth Corrections Act, 18 U.S.C. § 5010, and/or the Probation Act, 18 U.S.C. § 3651, entitle a defendant to a sentence of probation when all of the in-

formation presented to the trial judge, (from the probation office, the government attorney, and witnesses for the defendant,) shows that the defendant is an outstanding member of his community who acted only out of profound moral convictions, and deterrence is the sole basis asserted by the government for its recommendation of imprisonment.

4. Whether 28 U.S.C. § 2106 empowers a court of appeals to modify the sentence imposed by a district court where the record shows a clear abuse of discretion by the trial judge in weighing the factors relevant to sentencing under the applicable statutes and governing law.

Statutory Provisions Involved.

The Military Selective Service Act of 1967, 50 U.S.C. App. § 462, provides in part:

> "(a) Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451, 453, 454, 455, 456 and 458 to 471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty, and any person charged with such duty, or having and exercising any authority under said title [said sections], rules, regulations, or directions who shall knowingly make, or be a party to the making, of any false, improper, or incorrect registration, classification, physical or mental examination, deferment, induction, enrollment or muster, and any person who shall knowingly make, or be a party to the making, of any false statement or certificate regarding or bearing upon a classification or in support of any request for a particular classification, for service under the provi-

sions of this title [said sections], or rules, regulations, or directions made pursuant thereto, or who otherwise evades or refuses registration or service in the armed forces or any of the requirements of this title [said sections], or who knowingly counsels, aids, or abets another to refuse or evade registration or service in the armed forces or any of the requirements of this title [said sections], or of said rules, regulations, or directions, or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title [said sections], or rules, regulations, or directions made pursuant to this title [said sections], or any person or persons who shall knowingly hinder or interfere or attempt to do so in any way, by force or violence or otherwise, with the administration of this title [said sections] or the rules or regulations made pursuant thereto, or who conspires to commit any one or more of such offenses, shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment. . . .

. . . . . .

"(b) Any person (1) who knowingly transfers or delivers to another, for the purpose of aiding or abetting the making of any false identification or representation, any registration certificate, alien's certificate of nonresidence, or any other certificate issued pursuant to or prescribed by the provisions of this title [sections 451, 453, 454, 455, 456 and 458 to 471 of this Appendix], or rules or regulations promulgated hereunder; or (2) who, with intent that it

be used for any purpose of false identification or representation, has in his possession any such certificate not duly issued to him; or (3) who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate or any notation duly and validly inscribed thereon; or (4) who, with intent that it be used for any purpose of false identification or representation, photographs, prints, or in any manner makes or executes any engraving, photograph, print, or impression in the likeness of any such certificate, or any colorable imitation thereof; or (5) who has in his possession any certificate purporting to be a certificate issued pursuant to this title [said sections], or rules and regulations promulgated hereunder, which he knows to be falsely made, reproduced, forged, counterfeited, or altered; or (6) who knowingly violates or evades any of the provisions of this title [said sections] or rules and regulations promulgated pursuant thereto relating to the issuance, transfer, or possession of such certificate, shall, upon conviction, be fined not to exceed $10,000 or be imprisoned for not more than five years, or both. . . ."

The Federal Youth Corrections Act, 18 U.S.C. § 5010, provides in part:

"(a) If the court is of the opinion that the youth offender does not need commitment, it may suspend the imposition or execution of sentence and place the youth offender on probation.

"(b) If the court shall find that a convicted person is a youth offender, and the offense is punishable by imprisonment under applicable provisions of law other than this subsection, the court may, in lieu of the penalty of imprisonment otherwise provided by law, sen-

tence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Division as provided in section 5017 (c) of this chapter; or

"(c) If the court shall find that the youth offender may not be able to derive maximum benefit from treatment by the Division prior to the expiration of six years from the date of conviction it may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the youth offender to the custody of the Attorney General for treatment and supervision pursuant to this chapter for any further period that may be authorized by law for the offense or offenses of which he stands convicted or until discharged by the Division as provided in section 5017 (d) of this chapter.

"(d) If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision. . . ."

The Probation Act, 18 U.S.C. § 3651, provides in part:

"Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.

"Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, if the maximum punishment provided for such offense

is more than six months, any court having jurisdiction to try offenses against the United States, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may impose a sentence in excess of six months and provide that the defendant be confined in a jail-type institution or a treatment institution for a period not exceeding six months and that the execution of the remainder of the sentence be suspended and the defendant placed on probation for such period and upon such terms and conditions as the court deems best. . . ."

Rule 32 of the Federal Rules of Criminal Procedure provides in part:

"(a) (1) . . . Before imposing sentence the court shall afford counsel an opportunity to speak on behalf of the defendant and shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment.

. . . . . .

"(c) Presentence Investigation.

. . . . . .

"(2) Report. The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances affecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court. The court before imposing sentence may disclose to the defendant

or his counsel all or part of the material contained in the report of the presentence investigation and afford an opportunity to the defendant or his counsel to comment thereon. Any material disclosed to the defendant or his counsel shall also be disclosed to the attorney for the government."

28 U.S.C. § 2106 provides:

"The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances."

Statement of the Case.

Four days after his eighteenth birthday, John Walker visited his local draft board and announced his inability to register with the Selective Service System. Subsequently he was indicted pursuant to 50 U.S.C. App. § 462. Prior to trial, Walker's counsel tried unsuccessfully to persuade government counsel to agree to recommend probation, and thereafter determined to litigate the case on the basis of an obscure regulation. Both the trial and appellate courts held this regulation inapplicable, and Walker does not here challenge that ruling.

From the outset, the principal issue in this proceeding has been the nature and extent of punishment prescribed by the relevant statutes and governing law. Following his conviction, Walker submitted to the trial judge a presen-

tence memorandum, supported by numerous letters which demonstrate Walker's impeccable character and deeply-rooted pacifism, requesting that Walker be placed on probation under the Youth Corrections Act with direction that he perform civilian work for a period of two years, and concluding that, "To require confinement in the circumstances of this case would be an abuse of discretion and would raise serious constitutional questions involving the vagueness of sentencing standards, as well as other due process issues."

The report prepared for the trial judge by the probation office states in part that Walker's mother, (a widow who works as a registered nurse,) depends on Walker for the care of her younger children, and that,

> "John has never been involved in any prior difficulty and, therefore, is not known to the local police. This young man has an *excellent reputation* in the community and this is borne out by the many character reference letters sent to Judge Ford.
>
> "John readily admits that he refuses to register for the Selective Service Act and his actions in this case are a direct result of his *strong convictions against any type of war.* The writer found Walker to be *completely cooperative* during the entire presentence investigation." (Emphasis added.)

At the sentencing, Walker testified that he would obey a judicial order that he perform alternate service as a condition of probation. In its argument to the trial judge, the government conceded that Walker is "an outstanding member of his community" and that he is an "outstanding man," but nevertheless recommended two years imprisonment for the sole reason of deterrence. The trial judge, without reference to the presentence memorandum,

to the probation department's report, to the testimony, or to the arguments of counsel, and without a word of explanation, sentenced Walker to two years in the penitentiary.

On appeal, Walker argued that he was entitled to probation on statutory and constitutional grounds, that the appellate court had power to modify the lower court's sentence and should exercise it given the uncontroversial nature of the relevant fact, but that should the appellate court decline to modify the sentence itself, the case should be remanded to the district court for resentencing in accordance with specified standards and with direction that the trial judge explain the reasons for the resentence.

In affirming the sentence, (and thereby declining to remand or to require a statement of reasons by the trial judge,) the Court of Appeals held in part:

> "[Walker] was, at the time of his conviction, nineteen years old. He was one of eight children. His father, a surgeon, who had served in World War II, having died, his mother was left with two small children at home. Because appellant took a large degree of responsibility for them, his mother could resume work as a nurse. [Walker's] counsel's pre-sentence memorandum contained sixteen letters, from relatives, teachers, school officials, and neighbors, all portraying appellant as a pacifist of some year's convictions, as a good student, with no record of school or other infractions, as a mild-mannered but socially aware and constructive person. He had organized and run, according to the Director of Guidance for the Salem public schools, a responsibly conducted draft counselling service. He had organized and helped conduct a storefront arts, crafts, and music school for Salem children.

"Government counsel willingly conceded that [Walker] 'is an outstanding member of the community' but recommended a two-year prison term for deterrence reasons, arguing that since registration was the first step in the administrative process, enabling the government to assemble its available pool of manpower, failure to register was perhaps even a more serious offense than refusing to report for induction. The court, without articulation of reasons, imposed a two-year prison sentence well within the statutory maximum of imprisonment for five years, a fine of $10,000, or both, but apparently more severe than the sanctions generally imposed in most recent Massachusetts draft cases. . . .

"We nevertheless confess to a sense of uneasiness, in view of the single conclusory reason advanced to justify a sentence which, in the context of selective service sanctions currently imposed, may be relatively long for a young person who, except for this conviction, is deemed by all a valuable member of his community. Deterrence is, of course, a legitimate concern for both prosecution and the courts. In this case the prosecution did not make it clear how one who gives his name and address to the selective service authorities frustrates these authorities as much as one who, after registering, fails to keep his board informed of changes in his address.[5] . . . We note, finally, the observation of the court in *Daniels*, speaking of a Jehovah's Witness, who, like [Walker], would accept alternative sentence only if so ordered by the court: '. . . under the limited factual circumstances of this case, the issuance of an order

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"[5] Appellant, had his principles allowed him to register, would in all probability have been classified a conscientious objector and assigned alternative service, if, indeed, despite his high lottery number, he would have been called at all."

probating the Appellant subject to his performance of the identical work demanded of him by the Selective Service is not the kind of sentencing which would induce widespread disobedience of the orders of local Selective Service board.' 446 F.2d at 972." Appendix, 4-7.

Reasons for Granting the Writ.

I. The Decision below Raises Serious and Recurring Questions in the Administration of Federal Criminal Justice as to what Procedures are Required by the Constitution or Statutes when a Lower Court Exercises its Power to Sentence a Convicted Defendant.

A. In *Morrissey* v. *Brewer*, 408 U.S. 471 (1972), this Court held that, while the full panoply of procedural rights due a defendant in a criminal proceeding does not apply at a parole revocation hearing, 408 U.S. at 480, the minimal requirements of due process entitle the parolee to a statement of the evidence relied upon by the decision maker and of the reasons for deciding to revoke parole, 408 U.S. at 489.

A statement of reasons was also required in *Goldberg, Commissioner of Social Services of New York* v. *Kelly*, 397 U.S. 254, 271 (1970), *Kent* v. *United States*, 383 U.S. 541, 554, 561 (1966). The requirement has been applied in some criminal proceedings. *North Carolina* v. *Pearce*, 395 U.S. 711, 726 (1969). *McGee* v. *United States*, 462 F. 2d 243, 246-247 (2d Cir. 1972). *United States* v. *Latimer*, 415 F. 2d 1288, 1290-1291 (6th Cir. 1969).

In the absence of a statement of reasons, it is impossible to know whether or not the trial judge exercised his sentencing power on the basis of an impermissible ground, *e.g.*, a rigid policy based solely on the nature of the crime,

United States v. *Daniels*, 446 F. 2d 967, 968-973 (6th Cir. 1971), *United States* v. *McCoy*, 429 F. 2d 739, 742-744 (D.C. Cir. 1970); a policy of imposing a probation sentence only on defendants who plead guilty, *United States* v. *Wiley*, 278 F. 2d 500, 504 (7th Cir. 1960); reliance on the defendant's failure to acknowledge guilt in order to impose a more severe prison sentence, *Thomas* v. *United States*, 368 F. 2d 941, 944-946 (5th Cir. 1966); reliance on information which suggests that the defendant may have committed a much more serious offense, *United States* v. *Latimer*, 415 F. 2d 1288, 1290 (6th Cir. 1969), *United States* v. *Weston*, 448 F. 2d 626, 634 (9th Cir. 1971), cert. denied, 404 U.S. 1061 (1972); reliance on an *ex parte* communication by government counsel, *Haller* v. *Robbins*, 409 F. 2d 857, 860 (1st Cir. 1969); a mistaken belief that alternate service cannot be made a condition of probation, *United States* v. *Preston*, 445 F. 2d 808, 809 (9th Cir. 1971), cert. denied, 404 U.S. 1022 (1972); an error as to the maximum allowable sentence, *United States* v. *Carty*, 447 F. 2d 964, 965-966 (5th Cir. 1971); reliance on evidence illegally seized, *United States ex rel. Brown* v. *Rundle*, 417 F. 2d 282, 284-285 (3d Cir. 1969); or reliance on materially false information, *Townsend* v. *Burke*, 334 U.S. 736 (1948), *United States* v. *Tucker*, 404 U.S. 443, 447 (1972).

The American Bar Association Project on Minimum Standards for Criminal Justice, (hereinafter referred to as "ABA Project"), *Sentencing Alternatives and Procedures*, § 5.6 (Approved Draft, 1968), and *Appellate Review of Sentences*, § 2.3 (Approved Draft, 1968), recognize that a statement of the reasons for selecting a particular sentence is a minimum requirement of due process. Other commentators agree, *e.g.*, Note, *Procedural Due Process at Judicial Sentencing for Felony*, 81 Harv. L. Rev. 821, 843-846 (1968).

B. Sentencing is a critical stage of a criminal prosecution when a defendant is entitled to the assistance of counsel under the Sixth Amendment. *Mempa* v. *Rhay*, 389 U.S. 128, 132 (1967). This right is neither a "formality" nor a "ritualistic requirement" but means the right to effective assistance of counsel. As Judge Browning wrote in *Verdugo* v. *United States*, 402 F. 2d 599 (9th Cir. 1968) (separate opinion), "Since counsel is powerless to correct errors of which he is unaware, nondisclosure would appear to be equivalent, in practical effect, to lack of counsel." 402 F. 2d at 613. To the same effect, see *United States* v. *Bryant*, 442 F. 2d 775, 778 (D.C. Cir. 1971), *Haller* v. *Robbins*, 409 F. 2d 857, 860 (1st Cir. 1969). Cf. *Kent* v. *United States*, 383 U.S. 541, 560-562 (1966). Recognition of this right is implicit in various decisions requiring at least partial disclosure of information to the defense prior to sentencing. *United States ex rel. Brown* v. *Rundle*, 417 F. 2d 282, 284-285 (3d Cir. 1969); *Baker* v. *United States*, 388 F. 2d 931, 932-934 (4th Cir. 1968); *Smith* v. *United States*, 223 F. 2d 750, 754 (5th Cir. 1955); *United States* v. *Bryant*, 442 F. 2d 775 (D.C. Cir. 1971).

C. *Specht* v. *Patterson*, 386 U.S. 605, 610 (1967), held that due process requires, ". . . findings adequate to make meaningful any appeal that is allowed." Cf. *Scott* v. *United States*, 419 F. 2d 264, 266 (D.C. Cir. 1969). All of the cases cited above involve judicial review of sentences and many more could be cited. Recent selective service cases involving review of sentences include *United States* v. *Daniels* (*I*), 429 F. 2d 1273 (6th Cir. 1970); *United States* v. *Daniels* (*II*), 446 F. 2d 967 (6th Cir. 1971); *United States* v. *McKinney*, 427 F. 2d 449, 455 (6th Cir. 1970); *United States* v. *Griffin*, 434 F. 2d 740, 742 (6th Cir. 1970); *United States* v. *Dudley*, 436 F. 2d 1057, 1059 (6th Cir. 1971);

United States v. *Charles,* 460 F. 2d 1093, 1095 (6th Cir. 1972); *United States* v. *Adams,* 449 F. 2d 122, 124 (5th Cir. 1971); *United States* v. *Preston,* 445 F. 2d 808, 809 (9th Cir. 1971), cert. denied 404 U.S. 1022 (1972); *United States* v. *Freed,* 460 F. 2d 75, 79 (10th Cir. 1972); *McGee* v. *United States,* 462 F. 2d 243, 246-247 (2d Cir. 1972); *United States* v. *McCord,* 5 SSLR 3490 (2d Cir. 1972).

The basis for exercising the power to review lower court sentences is rarely discussed, although, *Thomas* v. *United States,* 368 F. 2d 941, 944-946 (5th Cir. 1966), and *United States* v. *Wiley,* 278 F. 2d 500, 502-504 (7th Cir. 1960), expressly rely on *McNabb* v. *United States,* 318 U.S. 332 (1943) and *Yates* v. *United States,* 356 U.S. 363, 366-367 (1958). *McNabb* held,

> "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force." 318 U.S. at 340-341.

The principle has been repeatedly reaffirmed, *e.g.,* Fay v. *New York,* 332 U.S. 261, 287 (1947); *Yates* v. *United States,* 356 U.S. 363, 366-367 (1958); *Marshall* v. *United States,* 360 U.S. 310, 313 (1959); *Bartone* v. *United States,* 375 U.S. 52, 54 (1963). This supervisory power exists in the Courts of Appeals. *La Buy* v. *Howes Leather Co., Inc.,* 352 U.S. 249, 259-260 (1957).

Another basis for the power to review criminal sentences is 28 U.S.C. § 2106 which was construed in *Bryan* v. *United States,* 338 U.S. 552 (1949), to authorize remand for a new

trial even where the trial court should have directed a verdict for the defendant. The antecedents of 28 U.S.C. § 2106, partially reviewed in the *Bryan* decision, *supra*, at 554, 557-558, were thoroughly analyzed in *Ballew* v. *United States*, 160 U.S. 187 (1895), which construed legislation enacted in 1872, 1879, 1889, and 1891, and held:

> "It thus conclusively appears that the authority of this court to reverse, and remand with directions to render such proper judgment as the case might require, upon writs of error in criminal cases . . . was confessedly conferred by express statutory provisions, *and that a like power was conferred upon Circuit Courts of Appeals* . . . in cases where they exercised jurisdiction by error *in criminal cases* over the District Court." (Emphasis added.) 160 U.S. at 201-202.

No reported decision has attacked the *Ballew* statutory analysis, and the early Circuit Court of Appeals decisions rely heavily upon *Ballew*. See, *e.g.*, *Farrar* v. *Wheeler*, 145 F. 482, 486-487 (1st Cir. 1906); *Hanley* v. *United States*, 123 F. 849, 855 (2d Cir. 1903); *Francis* v. *United States*, 152 F. 155, 157 (3d Cir. 1907); *Whitworth* v. *United States*, 114 F. 302, 305 (8th Cir. 1902); *Haynes* v. *United States*, 101 F. 817, 820 (8th Cir. 1900); *United States for Use of John Davis Co.* v. *Illinois Surety Co.*, 226 F. 653, 664 (7th Cir. 1915), aff'd 244 U.S. 376.

While some decisions may be found asserting that the English common law rule still controls, (see *Ballew, supra*, at 198-199,) the rule is most frequently said to be that a sentence within statutory limits, ". . . is *generally* not subject to review." (Emphasis added.) *United States* v. *Tucker, supra*, at 447 (where this Court nonetheless vacated a sentence "within statutory limits. . . .") Compare

Chief Judge Murrah's dissent in *Smith* v. *United States*, 273 F. 2d 462, 469 (10th Cir. 1959), regarding the scope of review authority conferred by 28 U.S.C. § 2106.

Whatever the scope of ". . . any appeal that is allowed . . ." either to supervise federal criminal proceedings or pursuant to 28 U.S.C. § 2106, due process requires ". . . findings adequate to make meaningful . . ." such right to appeal. *Specht* v. *Patterson, supra,* at 610. *Boykin* v. *Alabama,* 395 U.S. 238, 244 (1969). ABA Project, *Appellate Review of Sentences,* § 2.3 (Approved Draft, 1968); *Sentencing Alternatives and Procedures,* § 5.7 (Approved Draft, 1968).

D. In *Morrissey* v. *Brewer, supra,* this Court held,

> "As in *Goldberg,* 'the decision maker should state the reasons for his determination and indicate the evidence he relied on. . . .'" 408 U.S., at 487.

Although the procedural elements of due process vary according to the nature of the proceeding, *e.g., Cafeteria & Restaurant Workers Union, Local 473, AFL-CIO* v. *McElroy,* 367 U.S. 886, 895 (1961), due process minimally requires a statement of reasons and of the evidence relied upon. *Morrissey* v. *Brewer, supra,* at 489. This Court ". . . has eschewed rigid or formalistic limitations on the protection of procedural due process. . . ." *Board of Regents of State Colleges* v. *Roth,* 408 U.S. 564, 572 (1972), and held in *Perry* v. *Sindermann,* 408 U.S. 593, 603 (1972), that an inchoate right to future employment entitles a teacher to a hearing and a statement of reasons for his non-retention. A decision to impose a deprivation of liberty is the paradigm of a decision which ought to require no less. Rule 32 of the Federal Rules of Criminal Procedure requires a sentence hearing and provides that the

defendant is entitled to present "information in mitigation of punishment." Unless the trial judge discloses the evidence he relies on and the reasons for his decision, it is difficult if not impossible to know what evidence and circumstances need to be "mitigated", and neither society nor the defendant can be confident that the hearing is not a ritualistic ceremony without influence on the actual sentence.

E. The constitutional dimension of the tension which arises from the absence of procedural safeguards is evident in *McGautha* v. *California*, 402 U.S. 183 (1971) and *Furman* v. *Georgia*, 408 U.S. 238 (1972). While *McGautha* rests on recognition of a jury's power of nullification, 402 U.S. at 199, and on the impossibility of articulating standards adequate to govern the choice between life and death, 402 U.S. at 202-207, nothing in that decision suggests that an arbitrary procedure may be used to select one among as broad a range of alternative punishments as is available under 50 U.S.C. § 462. Nothing in the court's opinion suggests disagreement with Mr. Justice Brennan's proposition that due process,

> ". . . compels the States to make explicit the fundamental policy choices upon which any exertion of state power is based, and to exercise such power only under procedures that both limit the possibility of merely arbitrary action and provide a record adequate to render meaningful the institution of federal judicial review," (Dissent,) 402 U.S., at 287,

as applied to a statute such as 50 U.S.C. App. § 462.

The ABA Project, *Appellate Review of Sentences, supra*, observes that, ". . . in no other area of our law does one man exercise such unrestricted power. No other country

in the free world permits this condition to exist," at 2. The "transcending value" here at issue is, "Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law," Mr. Justice Frankfurter concurring in *Sherman* v. *United States*, 356 U.S. 369, 380 (1958), and the rule of law, that is to say "[a] government of laws and not of men," means the "rejection in positive terms of rule by fiat, whether by the fiat of governmental or private power. Every act of government may be challenged by an appeal to law. . . ." Mr. Justice Frankfurter concurring in *United States* v. *United Mine Workers of America*, 330 U.S. 258, 308 (1947). See also *McGautha* v. *California*, *supra*, at 285 (Mr. Justice Brennan dissenting.)

II. The Decision Below Raises Serious and Recurring Questions as to the Proper Interpretation of 50 U.S.C. App. § 462, and there is a Widespread Conflict among Lower Courts in the Application of its Penal Sanctions.

A. The decision below conflicts with *United States* v. *Daniels*, 446 F. 2d 967 (6th Cir. 1971), where under nearly identical factual circumstances, the Court of Appeals for the Sixth Circuit vacated a sentence of imprisonment which "defies" the congressional will and substituted a sentence of probation conditioned upon the performance of civilian work. 446 F. 2d, at 972.

Bearing in mind that, "Legislative 'policy' is . . . defined . . . by what . . . judges do in exercising the discretion . . . conferred upon them," Mr. Justice White concurring in *Furman* v. *Georgia*, *supra*, at 314, the decision below also conflicts with the evolving policy of 50 U.S.C. App. § 462: for the calendar years 1967, 1968, 1969, 1970, and 1971, the proportion of persons sen-

tenced under 50 U.S.C. App. § 462 and placed on probation steadily increased from 11% to 26% to 39% to 56% and to 63%, respectively. *Statistical Abstract of the United States*, p. 266, Chart No. 436 (1972). Since there is no reason to suppose that individual characteristics among such persons changed appreciably from year to year, this progression necessarily reflects an evolving policy to guide the exercise of sentencing discretion conferred by the statute.

In marked contrast, Chief Judge Solomon of the United States District Court for the District of Oregon, writes in *Sentences in Selective Service and Income Tax Cases*, 42 F.R.D. 481 (1970), noting his concern about the "wide disparity in the sentences imposed for Selective Service violations," *ibid*:

> "Modern theories of penology encourage us to treat the criminal and not the crime; . . . How does this apply to Selective Service cases? Many of these young men are idealists, with good backgrounds and excellent educations. They have been influenced
>
> "By respected public figures—Senators, Congressmen, and other people who hold high political and military office;
>
> "By presidents of great and respected universities;
>
> "By well-known scientists, scholars, writers and church leaders;
>
> all of whom say that our participation in the Vietnam was is unjust, immoral, and illegal. Many of these prominent people also say that the draft laws are unfair, immoral, and illegal.
>
> "We take these promising young men and, upon their conviction as Selective Service violators, we send them to the penitentiaries to serve sentences up to 5 years. We know that they will have to serve a much greater percentage of their terms . . . than they would

have had to serve had they been convicted of the Dyer Act or theft of a government check or had been convicted of larceny or embezzlement of funds belonging to the Post Office or a national bank. . . . (42 F.R.D. at 482-483.)

"Deterrence is the most important consideration in the sentencing of Selective Service violators.

"Our government has determined that the draft is the only feasible method of meeting our military manpower needs. . . . (42 F.R.D. at 485.)

"Since they probably would have been placed on probation had they committed any other non-violent crime, are we justified in denying them probation for a Selective Service violation?

"I think we are. Even though there are no mandatory minimums, a Judge must respect the objectives of the law which the defendants violated. . . . (42 F.R.D. at 486.)

"The reference to defendants placed on probation [in Oregon] needs some explanation. The great majority are Jehova's Witnesses who were classified as conscientious objectors. . . .

"At present, I believe that since the primary purpose of sentencing Selective Service violators is to deter others, longer sentences should be imposed on those violators who occupy prominent positions in student and anti-draft organizations. I intend to impose sentences of two years.

"For the follower, I would impose a sentence of 18 months, or in the alternative two years, with the requirement that the defendant spend six months in a jail-type institution and the balance of the time in civilian work of national importance. . . .

"I believe that harsher sentences will have the opposite effect. . . ." (42 F.R.D. at 487-488.)

The conflict between Judge Solomon's position and the widespread grant of probation to draft violators must be viewed in context of the fact that the number of draft indictments returned in 1965, 1966, 1967, 1968, 1969, and 1970, jumped from 369 to 642 to 1,388, to 1,698, to 3,455, and to 3,873, respectively. Hearings on the Administration and Operation of the Draft Law before the Special Subcommittee on the Draft of the House Armed Services Committee, 91st Cong., 2d Session, at 12853, 12861 (1970) (hereinafter "Hearings"), that it increased to 4,539 in 1971, 4 SSLR, 70, and that the Justice Department anticipates that 7,200 new indictments will be returned in fiscal 1973. 5 SSLR, 1.

Judge Solomon's prediction that draft violators serve a disproportionate percentage of their sentences is accurate. Indeed, the Federal Parole Board releases persons convicted of counterfeiting, embezzlement, forgery, fraud, income tax evasion and theft after shorter lengths of imprisonment (in absolute terms as well as percentage of sentence imposed), than it does persons convicted of draft violation. *Statistical Abstract of the United States*, p. 163, Chart No. 268 (1972). The need to articulate governing standards and to devise procedures to achieve parity in the application of these standards is therefore particularly acute in draft cases.

Judge Solomon is incorrect in his appraisal of congressional intent. The absence of a statutory minimum in 50 U.S.C. App. § 462, (compare 18 U.S.C. §§ 1403 and 1917,) is striking because the last major revision of the statute occurred in 1948, and of 1,137 persons convicted of draft violations in 1947, 32% received either probation or a fine (as compared with 19% and 17% in 1946 and 1945, respectively), while an additional 35% received prison sentences of one year or less. Note, *Sentencing Selective Violators: A Judicial Wheel of Fortune*, 5 Col. L. J. & Soc. Probs. 160, 176, Table III (1969).

Further, 18 U.S.C. § 5010(d) expresses a congressional determination that a person under the age of twenty-two years at the time of conviction (Walker was nineteen), should be sentenced under the Youth Corrections Act unless, ". . . the court shall find that the youth offender will not derive benefit from treatment . . ." thereunder. (Congress has in the past excluded persons convicted of specific crimes from the operation of this statute, see former 26 U.S.C. § 7237(d).) It follows that a youth offender who does not need "treatment" should be granted probation pursuant to 18 U.S.C. § 5010(a). Cf. Institute on Sentencing, 35 F.R.D. 381 (1964), at 415, Form No. 14.

Moreover, 18 U.S.C. § 3651 was amended in 1948 to provide for split sentences of six months followed by probation. Implicit in this amendment is a congressional determination that, when most factors militate in favor of probation but "some" imprisonment is deemed necessary, a maximum of six months ordinarily serves the purpose. For all categories of persons convicted of federal crimes, the percentage placed on probation increased from 37% in 1954 to 50% in 1963. Herlands, *When and How Should a Sentencing Judge Use Probation*, 35 F.R.D. at 487 (1964). Surely one of the facts underlying congressional policy favoring probation is the relative cost of incarceration as opposed to probation. *Op cit.* 489.

Judge Solomon's reading of the congressional will from the Army's manpower needs is based on an erroneous assumption. As the Report of the President's Commission on an All-Volunteer Armed Force (1970) (hereinafter "Report on an All-Volunteer Armed Force"), makes plain, the problem in administering the Selective Service System is that only a very small minority among the annual crop of eighteen-year-olds is needed to complete the Army's ranks which are mostly filled by career personnel. The problem is an overabundance of manpower, a circumstance reflected

in the fact that during fiscal 1971, 50% of registrants who received a preinduction medical examination were disqualified, while another 24% who received an induction medical examination were also disqualified. Statistical Abstract of the United States, p. 264, Chart No. 433 (1972), SSLR 6021, 6024.

In addition, Judge Solomon fails to take into account, (when he dismisses the pertinence of "Modern theories of penology",) congressional approval of the concept of individualized sentences announced in *Williams* v. *New York*, 337 U.S. 241, 247, 248, n. 13 (1949). There is nothing to suggest that Congress meant 50 U.S.C. App. § 462 to embody a policy other than one of individualized sentencing. Thus, Judge Solomon's inflexible rule conflicts not only with orthodox penological concepts, but also with the pronouncements of this Court and with the ascertainable will of Congress.

Indeed, the language of 50 U.S.C. App. § 462 also conflicts with Judge Solomon's view of congressional policy, for the spectrum of offenses within the scope of the statute is very broad: included is misbehavior by Selective Service personnel in the course of registration, classification, or physical and mental examinations; falsifying information bearing on classification; counselling, aiding or abetting evasion of duties imposed by the statute; hindering, by force or violence or otherwise, the administration of the statute; transferring or possessing a false certificate for purposes of identification; forging, altering, destroying or mutilating a certificate; as well as failure to observe any of the regulations promulgated under the draft law. All are subject to the same penalty provision with a maximum of five years and/or $10,000 fine. It offends common sense to read into this statute a congressional will to send Walker to the penitentiary for two years.

As for Judge Solomon's suggestion that Jehovah's Witnesses may be granted probation while denying it to others such as Walker, (see the finding of the court below, Appendix, at 35, n. 5,) raises grave questions of equal protection. *United States* v. *McCord*, 5 SSLR 3490, 3492-3493 (2d Cir. 1972), Judge Feinberg dissenting.

B. The deterrence argument is specious. The court below concurred with the judgment of the Court of Appeals for the Sixth Circuit in *United States* v. *Daniels, supra,* 446 F. 2d at 972, that deterrence is of little significance on the facts of this case. Appendix, at 35.

The purpose of the draft law is to recruit soldiers and, by definition, to do so from among nonpacifists. It would be frivolous to suggest that such nonpacifists would be emboldened to violate the draft if Walker received probation.

The fact that Walker's crime is failure to register further undercuts the deterrence rationale because there exist substantial inducements for registration: anyone with a moderately high random selection number is secure; the chance of being found medically unfit for military service is more than 50%; the chance of successfully running through the gamut of selective service regulations and benefiting from local board procedural errors is very high (Hearings, *supra,* at 12871-12872); and (whatever the result in Walker's case), 63% of draft violators received probation in 1971. Beyond this, failure to (1) report for induction, (2) submit to induction, and (3) report for alternate service, account "by far" for most draft indictments. Hearings, *supra,* at 12856. Of particular significance is the fact that persons who fail to register do not, like Walker, advise their local boards; they go underground and are uncovered, if at all, by the FBI. Hearings, *supra,* at 12848. The possibility is remote in the extreme that any such person would be affected by the outcome of Walker's case.

From the perspective of a would-be draft-evader, the possibility of imprisonment is more persuasive than the possibility of freedom—particularly when freedom hinges on the ability of this draft-evader to convince the trial judge that, like Walker, he is an "outstanding member of the community."

The analogy frequently drawn between tax and draft violations rests on a superficial analysis that offenders in both classes tend to be noncriminal types. What the analogy overlooks is the acute need to deter tax evaders, thereby perhaps justifying a relatively inflexible policy of imprisonment. As the Report on an All-Volunteer Armed Force, *supra,* proves beyond a reasonable doubt, the need to deter violations of the draft simply does not have the same urgency.

C. Under the teaching that "abuse of discretion" means "a clear error of judgment in the conclusion . . . reached upon a weighing of the relevant factors," Jaffe, *Judicial Control of Administrative Action,* 182 (1965), it is manifest that the trial judge committed precisely such a clear error of judgment by giving far too much weight to the need for deterrence (assuming he adopted the government's reasoning; the record discloses no other basis). As *United States* v. *McCoy,* 429 F. 2d 739 (D.C. 1970) held, "But *a rigid policy* based solely on the crime with which the defendant is charged *is not an exercise of discretion,*" 429 F. 2d 743 (emphasis added), and that is equally true of the deterrence policy in draft cases.

Or stated differently, a judge who imposes a sentence on the basis of an assumption that deterrence in draft cases invariably requires imprisonment is acting on the basis of what amounts to "misinformation." Cf. *United States* v. *Tucker*, 404 U.S. 443, 447 (1971); *United States* v. *McCord*, 5 SSLR 3490, 3493 (2d Cir. 1972), dissent of Judge Feinberg.

Conclusion.

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the First Circuit.

Respectfully submitted,

JOHN G. S. FLYM,

Counsel for the Petitioner.

January 3, 1973.

Appendix.

United States Court of Appeals for the First Circuit.

No. 72-1140

UNITED STATES OF AMERICA,
APPELLEE,
v.
JOHN DABNEY COLLIER WALKER,
APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before COFFIN, *Chief Judge*,
ALDRICH and CAMPBELL, *Circuit Judges*.

John G. S. Flym, with whom *Flym, Geller, Miller, Taylor & Weinberg* was on brief, for appellant.
Robert B. Collings, Assistant United States Attorney, with whom *Joseph L. Tauro*, United States Attorney, was on brief, for appellee.

December 4, 1972

COFFIN, *Chief Judge*. Appellant was convicted of failure to register with the Selective Service System, in violation

of 50 Appendix U.S.C. §§ 453, 462. Four days after he became eighteen, he visited his local board and announced that he was not going to register. The executive secretary told him that, by failing to register, he could be subject to imprisonment or a large fine. In response to questions, appellant gave his name, address, and date of birth, and departed. The next day the executive secretary wrote him a letter, noting his birth date, and stressing the importance that he register as soon as possible or else "be suspected of being a delinquent". Appellant did not return to the board, respond to this letter, or otherwise supply the board with the remaining information necessary for registration. Appellant was subsequently found guilty by a jury of failure to register and sentenced to two years imprisonment.

Appellant protests both his conviction and his sentence. As his defense on the merits, he cites non-compliance by the board with 32 C.F.R. § 1613.16.[1] Appellant does not contest the fact that, prior to his visit, he knew that his refusal to register could subject him to imprisonment. *Cf. United States* v. *Kelly*, 336 F. Supp. 686 (E.D. Pa., 1972). Nevertheless, he relies on *Chernekoff* v. *United States*, 219 F.2d 721 (9th Cir. 1955) and *United States* v. *Kroll*, 402 F.2d 221 (3d Cir. 1968), which required a similar warning procedure under AR 601-270 in the event that an

[1] "If the registrant refuses to cooperate or is inclined to evade, refuses to answer, or answers falsely, his attention should be called to the penal provisions . . . of the Military Selective Service Act of 1967. If he is still refractory, witnesses should be called and, after the penalty of the law has been explained again to him in the presence and hearing of witnesses, a full opportunity should be given him to reconsider his actions and answer the questions. If he is still refractory, his name and the names of the witnesses should be noted and the case immediately reported to the United States district attorney. The registration should not be obstructed or delayed. Persons attempting to obstruct or delay it should be dealt with promptly and firmly."

inductee refused to step forward. This procedure, as noted in *Chernekoff*, at 724, which is part of the prescribed method of induction devised by the Army for use in processing groups of prospective inductees, has several formal steps.[2]

The selective service warning mandated by § 1613.16 is not in the context of such final formalities but is, we think, similarly a part of a process which has commenced. The ceremonial warning with witnesses is similarly a last rite to be administered before a crime is committed, i.e., a refusal to cooperate, giving false or evasive answers, or refusing to answer. These are crimes committed during the process of registration. They are not, we think, committed by an anticipatory announcement made by one who has not yet presented himself for and submitted to registration.

The regulatory scheme corroborates this interpretation. Regulation 1613.16 is part of Part 1613—Registration Procedures, beginning with § 1613.1 which provides that "[a]ny person required to be registered may present himself for and submit to registration . . . ." This is followed by other sections dealing with the manner of conducting the interview (§ 1613.11), completion of the registration card (§ 1613.12), signature (§ 1613.13), and certification (§ 1613.14). At this point is located § 1613.16, indicating that the objective of this regulation is to deal with the registrant who has presented himself for registration but has thereafter manifested his recalcitrance and to give him "a full opportunity . . . to reconsider his actions and

[2] The method contemplates the assembling of a group of prospective inductees, informing them of the imminence of induction and of the significance of the step forward, the removal of those who refuse, informing such persons of the criminal sanctions, calling on them again to step forward, and finally, requesting the recalcitrant registrant to sign a statement of refusal before two witnesses. *Chernekoff, supra*, 219 F.2d at 724 n. 12. (Predecessor and similar regulation.)

answer the questions." *United States* v. *Bigman*, 429 F.2d 13 (9th Cir. 1970). Here, appellant has not presented himself for or submitted to registration, and, indeed, had not refused to answer any questions. He had merely refused to put in writing the beliefs he had stated orally, not a part of the process of registration.

While we recognize that the purpose of the ceremonial warning might well apply to one like appellant, who visits his local board to announce his intention not to register, such an expansive reading of the regulation would leave local board officials in doubt as to when they must invoke the warning-*cum*-witnesses apparatus of the regulation. Visits of young eligibles could range from those seeking information, to those expressing uncertainty, generalized hostility, and specific intent, and could be subject to different interpretations by visitor and official. We therefore confine the scope of the warning obligation within what we deem a permissible narrow reading of the regulations. We conclude that appellant's motion for acquittal was properly denied.

The issue of appellant's sentence is a more vexing one. Appellant was, at the time of his conviction, nineteen years old. He was one of eight children. His father, a surgeon, who had served in World War II, having died, his mother was left with two small children at home. Because appellant took a large degree of responsibility for them, his mother could resume work as a nurse. Appellant's counsel's presentence memorandum contained sixteen letters, from relatives, teachers, school officials, and neighbors, all portraying appellant as a pacifist of some years' convictions, as a good student, with no record of school or other infractions, as a mild-mannered but socially aware and constructive person. He had organized and run, according to the Director of Guidance for the Salem public schools, a responsibly conducted draft counselling service. He had organized and

helped conduct a storefront arts, crafts, and music school for Salem children.

Government counsel willingly conceded that appellant "is an outstanding member of the community" but recommended a two-year prison term for deterrence reasons, arguing that since registration was the first step in the administrative process, enabling the government to assemble its available pool of manpower, failure to register was perhaps even a more serious offense than refusing to report for induction. The court, without articulation of reasons, imposed a two-year prison sentence, well within the statutory maximum of imprisonment for five years, a fine of $10,000, or both, but apparently more severe than the sanctions generally imposed in most recent Massachusetts draft cases.[3]

We are not oblivious to the serious attention being devoted to many aspects of the sentencing process, including sentence review. *See, eg.*, American Bar Association Project on Standards for Criminal Justice, *Appellate Review of Sentences* (Approved Draft, 1968); Working Papers of the National Commission on Reform of Federal Criminal Laws, Vol. II, pp. 1334-1335 (1970). And, even in the absence of legislation or broadly accepted policy, we have set aside sentences when impropriety has clearly appeared, *Marano* v. *United States*, 374 F.2d 583 (1st Cir. 1967), *United States* v. *Picard*, 464 F.2d 215 (1st Cir. 1972), as have other appellate courts, *Yates* v. *United*

[3] Appellant presented to the district court only some national statistics, showing the increasing and frequent recourse to probation. He now represents to us that, of twenty-three selective service defendants sentenced in the District of Massachusetts in the past two years, thirteen received probation, one received a fine and probation, two received sentences of a year or less, five received two-year sentences, and two received three-year sentences. Most of the offenses involved failure to perform alternative service (7) and failure to report for and/or submit to induction (14). None involved a failure to register. See also SSLR 6001, 6003, 6019.

States, 356 U.S. 363, 366-367 (1958), *United States* v. *Wiley*, 278 F.2d 500 (7th Cir. 1960), *Scott* v. *United States*, 419 F.2d 264, 266-267 (D.C. Cir. 1969), and *United States* v. *Daniels*, 446 F.2d 967 (6th Cir. 1971). In such cases, however, there was a positive showing that either improper factors were considered or proper ones were not, establishing the lack of the individualized sentence approach endorsed in *Williams* v. *New York*, 337 U.S. 241 (1949), *United States* v. *McKinney*, No. 72-1480 (6th Cir. June 15, 1972). The case at bar presents a less clear situation: the sentence, in absolute terms, is not a long one and deterrence is not an improper consideration in many cases. We do not feel justified in mandating that it be set aside.[4]

We nevertheless confess to a sense of uneasiness, in view of the single conclusionary reason advanced to justify a sentence which, in the context of selective service sanctions currently imposed, may be relatively long for a young person who, except for this conviction, is deemed by all a valuable member of his community. Deterrence is, of course, a legitimate concern for both prosecution and the courts. In this case the prosecution did not make it clear how one who gives his name and address to the selec-

[4] Appellant also relies on 18 U.S.C. § 5010(d), which requires a sentence treatment under the supervision of the Attorney General, unless "the court shall find that the youth offender will not derive benefit from treatment". But "treatment" is elsewhere defined as "corrective and preventive guidance and training designed to protect the public by correcting the antisocial tendencies of youth offenders", 18 U.S.C. § 5006. It does not seem applicable to this appellant, who all agree has no antisocial tendency. Such a reading, however, can result in the anomaly that an antisocial youth who refuses to register would avoid prison while a thoroughgoing pacifist like appellant might not. The existence of this treatment commitment provision for the antisocial, and of a probation provision in § 5010(a) for all youth offenders, and the fact that Congress has not required a minimum mandatory sentence for violation of 50 U.S.C. App. § 462 are factors to be borne in mind by a sentencing court.

tive service authorities frustrates these authorities as much as one who, after registering, fails to keep his board informed of changes in his address.[5] Nor did either party make available to the district court, so far as the record discloses, data concerning the sentences meted out in recent periods to other draft offenders or the fact, if it is a fact, that the crime of refusal to register in Massachusetts has been so rare that there has recently been no prosecution through to sentence. We note, finally, the observation of the court in *Daniels*, speaking of a Jehovah's Witness, who, like appellant, would accept alternative sentence only if so ordered by the court: ". . . under the limited factual circumstances of this case, the issuance of an order probating the Appellant subject to his performance of the identical work demanded of him by the Selective Service is not the kind of sentencing which would induce widespread disobedience of the orders of local Selective Service boards." 446 F.2d at 972.

Perhaps reconsideration would produce the same decision but, though unable to do more, we suggest, as did the court in *Government of Virgin Islands* v. *Turner*, 409 F.2d 102 (3d Cir. 1968), speaking through Judge Aldrich of this court, that appellant move for a reduction of sentence within the time allowed by Fed. R. Crim. P. 35 so that the district court may have an opportunity to reconsider this matter. *See also*, for similar dispositions, *United States* v. *Daniels*, 429 F.2d 1273 (6th Cir. 1970) and *United States* v. *Adams*, 449 F.2d 122 (5th Cir. 1971).

Affirmed.

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[5] Appellant, had his principles allowed him to register, would in all probability have been classified a conscientious objector and assigned alternative service, if, indeed, despite his high lottery number, he would have been called at all.